Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	CC Docket No. 96-98
Petition of MCI for Declaratory Ruling	)	CCB Pol. 97-4

COMMENTS OF BELL ATLANTIC[1] AND NYNEX[2]

I. Introduction and Summary

The Commission should dismiss MCI's Petition,[3] which is procedurally and substantively flawed. At its heart, MCI's Petition is nothing more than a collateral attack on the provisions of Statements of Generally Available Terms filed by one carrier in two states and of one state arbitration award. These are matters entrusted by the 1996 Act to the state commissions and the courts, not this Commission, and it is in those forums where MCI must seek any remedy to which it might be entitled. Moreover, MCI's Petition is substantively flawed as well. MCI seeks to impose upon incumbent local exchange carriers the obligation to negotiate with third party vendors on behalf of competing carriers, and to absorb a portion of the costs they

[1] The Bell Atlantic telephone companies ("Bell Atlantic") are Bell Atlantic-Delaware, Inc.; Bell Atlantic-Maryland, Inc.; Bell Atlantic-New Jersey, Inc.; Bell Atlantic-Pennsylvania, Inc.; Bell Atlantic-Virginia, Inc.; Bell Atlantic-Washington, D.C., Inc.; and Bell Atlantic-West Virginia, Inc.

[2] The NYNEX telephone companies ("NYNEX") are New York Telephone Company and New England Telephone and Telegraph Company.

[3] Petition of MCI for Declaratory Ruling (filed Mar. 11, 1997) ("Petition").

incur on behalf of MCI in doing so. This result would be flatly inconsistent with the Act, and, therefore, MCI's petition must be denied as substantively without merit.

II. MCI's Petition Is Procedurally Defective.

As an initial matter, MCI filed its Petition in the wrong forum. MCI complains that provisions in Statements of Generally Available Terms filed by Southwestern Bell in two states, and in an arbitration award in a third Southwestern Bell state, contain unreasonable conditions regarding who must obtain licenses for intellectual property.[4] The Act, however, gives state commissions, not the FCC, exclusive authority to review such Statements.[5] Similarly, state commissions are the only bodies authorized to review interconnection agreements and to arbitrate disputed issues in interconnection negotiations. This Commission's authority is limited to acting only if the state fails to do so.[6] In addition, review of state arbitration decisions lies exclusively in Federal district court.[7] MCI's Petition, therefore, improperly asks the Commission to interfere with processes that rest with the states and the courts under the Act, and it must be dismissed for want of jurisdiction.

MCI's Petition is procedurally defective for yet another reason. The need to license or sublicense intellectual property associated with equipment or software varies widely from company to company and vendor to vendor, frequently turning on the terms of contracts

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[4] ***Id.*** at 3-4.

[5] 47 U.S.C. § 252(f).

[6] 47 U.S.C. § 252(e)(1) and (5).

[7] 47 U.S.C. § 252(e)(6).

with widely disparate terms. Individual intellectual property issues are most properly included in individual interconnection negotiations, Statements of Generally Available Terms, and arbitrations, as they have been in the cases MCI cites. An industry-wide declaratory ruling cannot take into account all of the contractual variations and could inadvertently upset or undermine the negotiation and arbitration process that Congress established.

III. MCI's Petition is Substantively Flawed.

On the merits, the essence of MCI's Petition is that the incumbent local exchange carriers uniformly should be required to negotiate with vendors on MCI's behalf to obtain rights to the vendors' intellectual property. MCI further asserts that existing licenses are sufficient to cover new services but, if they are not, the incumbent carriers should pay a portion of the cost of such negotiation and of any additional rights needed to provide service to MCI. MCI's claims are flatly wrong in several respects.

First, MCI asserts that the incumbent local exchange carrier should absorb a portion of the costs of any additional intellectual property license fees that are required to provide MCI with unbundled network elements or services for resale, including the cost of negotiating any such fees.[8] MCI ignores, however, the clear provisions of the Act. Section 252(d) expressly assigns to the state commissions authority to determine what costs can be recovered in the prices for network elements and services offered for resale. That same provision gives the incumbent carrier that provides services to a competing local provider the right to include in the cost of interconnection elements all of the costs incurred by the incumbent carrier

[8] Petition at 8-9.

to offer those elements, and requires the incumbent carrier to deduct only the amount of any costs actually *avoided* in providing services for resale. Nothing relieves a competing local carrier of the obligation to pay for any *additional* cost of providing service, including any additional fees the incumbent carrier must pay to the vendor and the cost of negotiating those fees.[9] The additional license fees in question would simply not be required if the incumbent carrier were not providing service to MCI, and the Act, therefore, provides for recovery of those costs.

Next, MCI asserts that interconnectors lack the "leverage" to negotiate reasonable terms and, therefore, the Commission should require incumbent carriers to negotiate on their behalf.[10] There is no justification for MCI's unsupported claim. An individual incumbent local exchange carrier would be negotiating on primarily a regional basis for licenses to cover its local service. Many of the interconnectors, on the other hand, would be negotiating on a national basis, perhaps even jointly with other interconnectors, for licenses covering both interexchange and local service. With a vast potential for expanded local operations throughout the country, interconnectors would have substantial leverage to negotiate favorable terms for their extensive future needs.

If the Commission nonetheless gives incumbent exchange carriers any responsibility to negotiate any additional licenses on the interconnectors' behalf, any such responsibility should be limited to the use of commercially reasonable best efforts to obtain, or to facilitate the interconnector's procurement of, the required additional rights. The incumbent

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[9] 47 U.S.C. § 252(d). Increased fees could consist of additional discrete license payments or increased procurement costs that result from the expanded software use.

[10] Petition at 8-9.

carrier should have no additional obligation if an unaffiliated vendor chooses not to negotiate with the incumbent or insists on conditions that a competitor finds unreasonable.

Third, MCI contends, without support, that "reselling services" does not normally "implicate any intellectual property rights of third parties."[11] In making this claim, MCI does not attempt to differentiate between resold services and provision of unbundled network elements which a competitor may combine with its own facilities to offer service to the public. The latter could implicate intellectual property rights which the reselling of services does not. The extent to which either requires additional licensing fees, however, will depend upon a fact-specific analysis of each of the agreements which each incumbent local exchange carrier has signed with its vendors.[12] These agreements have been negotiated over the course of many years, for the most part prior to enactment of the 1996 Act, and include a wide variety of licensing provisions.

As a result, whether or not any individual provision is sufficient to cover unbundled network elements and services provided for resale by interconnectors could become the subject of discussion and negotiation between the carriers and their vendors. The extent to whether additional license rights will be required (or costs incurred) in any given transaction with a local competitor is likely to turn on a number of factors, including the type of transaction (e.g. resale versus unbundled element offering) and the exact language of the license. As a result, MCI's claim cannot be substantiated without a detailed examination of all agreements.

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[11] ***Id.*** at 6.

[12] Bell Atlantic and NYNEX each have thousands of effective license agreements.

[13] The Commission could assist any negotiation by suggesting that a narrow interpretation of pre-existing conditions could unreasonably increase costs of interconnection or restrain competition.

IV. Conclusion

Accordingly, the Commission should dismiss the Petition for want of jurisdiction. Should it consider the substance of the Petition, it should find that all costs of procuring any additional license rights must be borne by the interconnectors.

Respectfully Submitted,

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April 15, 1997

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of April, 1997 a copy of the foregoing "Comments of Bell Atlantic and NYNEX" was sent by first class mail, postage prepaid, to the parties on the attached list.

Tracey M. DeVaux

* Via hand delivery with appendices attached.

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